LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 22 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

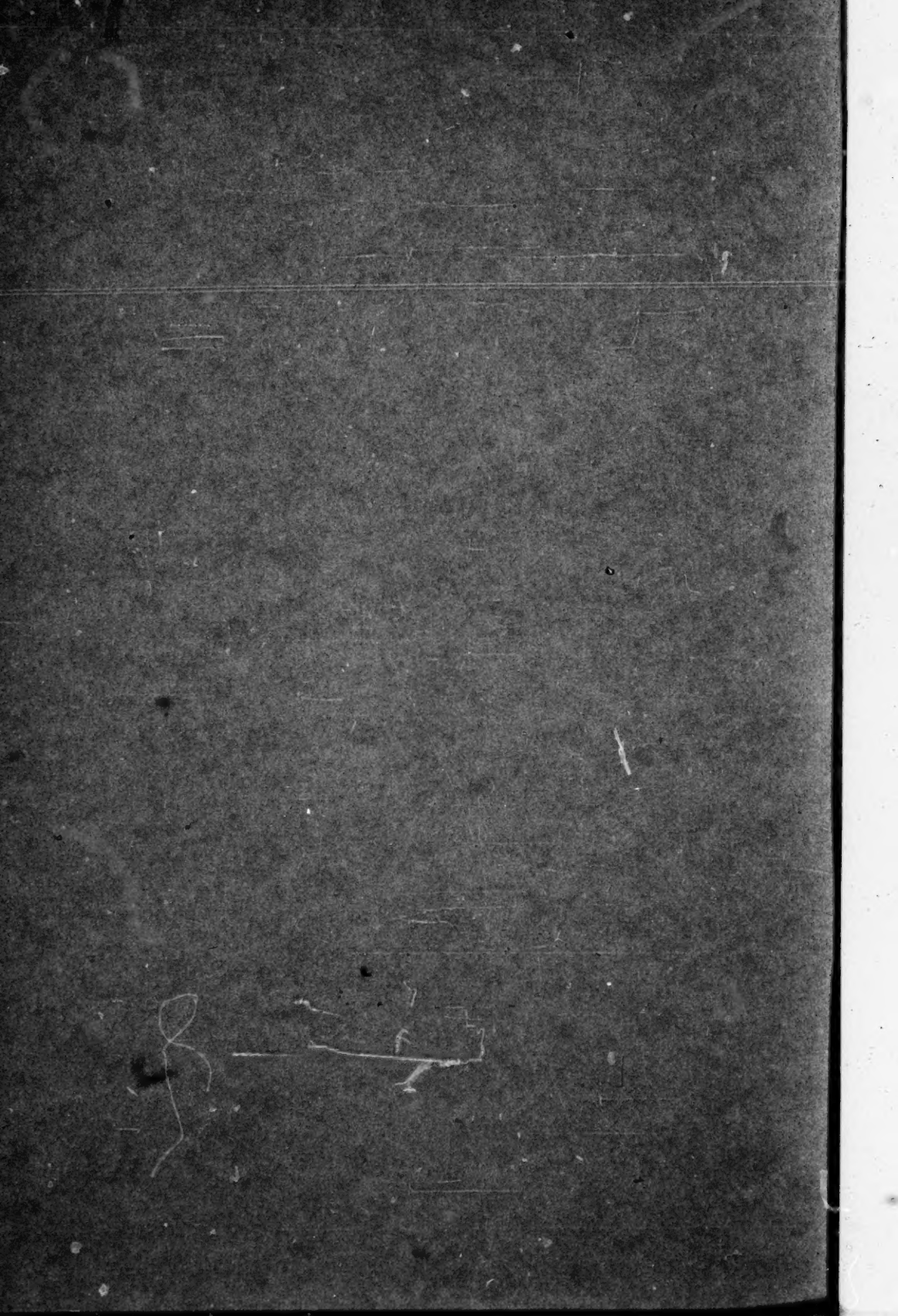
FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY M. MORLEY
FRANCIS H. CASKIN
LOUIS FLAX
SHANNON AND MORLEY
1700 K Street, N. W.
Washington, D. C. 20006
Attorneys for
Alabama-Tennessee Natural Gas Company

December 22, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
I. History of Alabama-Tennessee's Service to Corinth	3
II. The Administrative Proceedings Below	5
III. The Decision of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	11
I. The Decision of the Court Below Is in Conflict With Decisions of the United States Supreme Court Which Delineate the Limits of the Commission's Power to Modify and Revoke Certificates of Public Convenience and Necessity	11
II. The Decision of the Court Below Is in Conflict With the Holding of Another Circuit and This Court With Respect to the Applicability of Section 7(b) of the Act	12
III. There Are Important Statutory Issues Involved	14
CONCLUSION	17
APPENDICES:	
APPENDIX A (Petition for Review of Orders of the Federal Power Commission [Alabama Case])	1a
APPENDIX B (Petition for Review of Orders of the Federal Power Commission [Alabama Case])	11a
APPENDIX C (On Petition for Rehearing and Petition for Rehearing En Banc)	12a
APPENDIX D (Excerpts From the Natural Gas Act)	13a

TABLE OF CASES

CASES: Page

American Trucking Associations, Inc. v. Frisco Transportation Company, 358 U.S. 133 (1961) 11
Atlantic Seaboard Corporation v. F.P.C., 397 F.2d 753 (4th Cir. 1968) 17
Cincinnati Gas & Electric Company v. F.P.C., 389 F.2d 272 (6th Cir. 1968) cert. den., 393 U.S. 826 17
City of Pittsburgh v. F.P.C., 237 F.2d 741, (D.C. Cir. 1956) 13, 14
Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961) 11
Home Gas Company v. F.P.C., 231 F.2d 253 (D.C. Cir. 1956) cert. den., 352 U.S. 831 17
Kentucky Natural Gas Corp. v. F.P.C., 159 F.2d 215 (6th Cir. 1947) 17
Michigan Consolidated Gas Company v. F.P.C., 283 F.2d 204 (D.C. Cir. 1960) cert. den., 364 U.S. 913 ..... 10, 13, 14
Panhandle Eastern Pipe Line Company v. F.P.C., 169 F.2d 881 (D.C. Cir. 1948) cert. den., 335 U.S. 854 .. 17
Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2nd Cir. 1965) cert. den., 384 U.S. 941 .. 14
Sun Oil Company v. F.P.C., 364 U.S. 170 (1960) 12
United Gas Pipe Line Co. v. F.P.C., 385 U.S. 83 (1966) 10, 12, 13
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 15
United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947) 9, 11, 14, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 4, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in Appendix A hereto, *infra,* pp. 1a-10a, is reported at —— F.2d ——. Opinion No. 534 of the Respondent Federal Power Commission ("Commission") (J.A. 103-131) is reported at 38 FPC 1069. An order of the Commission denying rehearing, stay and reopening of the record (J.A. 132-136) is reported at 39 FPC 97.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1969 (Appendix B. p. 11a). A timely petition for rehearing *en banc* was denied on September 24, 1969 (Appendix C.) and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under Section 19(b) of the Natural Gas Act ("The Act") [15 U.S.C. § 717r(b)] and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may modify and revoke the numerous certificates of public convenience and necessity issued Alabama-Tennessee under Section 7(e) of the Act [15 U.S.C. § 717f(e)] and relied upon by that company in constructing authorized facilities over a period of years, by terminating the long-established service rendered by Alabama-Tennessee to the City of Corinth, Mississippi (Corinth) and replacing it by service from another natural gas company.

2. Whether Section 7(b) of the Natural Gas Act, [15 U.S.C. § 717f(b)] providing for abandonment of certificated service applies to cases, such as this case, where a natural gas company is ordered by the Commission to terminate certificated service to a customer.

3. If the Commission is required to apply the standards of Section 7(b) in this case, should the Commission consider only the impact upon the party to which service is being terminated or should it also consider (a) the detriment to all those affected, including the natural gas pipeline company, the investing public which has relied upon the company's certificates and the company's remaining customers in other states, and (b) reasonable alternatives to the termination of service.

4. Whether the Commission may, pursuant to Section 7(a) of the Natural Gas Act [15 U.S.C. § 717f(a)], direct service of natural gas by a new supplier through new facilities which duplicate and render useless existing facilities of a presently certificated supplier already serving the market.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 4(b), 7(a), 7(b), 7(c), 7(e) and 7(g) of the Natural Gas Act [15 U.S.C. §§ 717c(b), f(a), f(b), f(c), f(e) and f(g)]. They are printed in Appendix D hereto.

STATEMENT OF THE CASE

I. History of Alabama-Tennessee's Service to Corinth.

Alabama-Tennessee is a natural gas company authorized by the Commission to transport and sell natural gas in interstate commerce pursuant to permanent certificates of public convenience and necessity granted under Section 7(e) of the Act. Its pipeline system is located in three states and serves a region extending approximately 140 miles from a point near Selmer, Tennessee, easterly to Huntsville, Alabama.

The company is one of the smallest pipeline companies subject to the Commission's jurisdiction. It serves 16 customers who buy natural gas in interstate commerce for resale, the rates for which are regulated by the Commission. These customers include the municipally-owned distribution system of the City of Corinth, Mississippi. Alabama-Tennessee also serves six direct industrial customers.

Alabama-Tennessee was initially authorized to construct and operate interstate pipeline facilities by a certificate of public convenience and necessity granted by the Commission on July 2, 1948 (7 FPC 251, 257). This authorization was based on the Commission's authorization for Alabama-Tennessee to purchase all of its natural gas requirements from Tennessee Gas Transmission Company, predecessor in interest to Tennessee Gas Pipeline Company, a division of Tenneco, Inc. ("TGP").

Alabama-Tennessee's initial authorization included service to Corinth. Although Corinth had previously approved a municipal bond issue to build a 22-mile pipeline and buy gas directly from TGP (J.A. 3) the city decided, in view of the economies involved, to become a customer of Alabama-Tennessee (7 FPC at 255). At Corinth's request, Alabama-Tennessee rerouted its original 10-inch main line, increasing its overall length by about ten miles so as to pass within 2½ miles of Corinth and built a 2½ mile lateral line to Corinth's city limits.

After the initial construction of the Alabama-Tennesse system, Alabama-Tennessee served the growing demands of all of its customers, including Corinth's, by expanding its system practically every year. In

each instance, the Commission found these expansions were required by the public convenience and necessity and issued certificates authorizing the projects. Alabama-Tennessee expanded its system in reliance upon such certificates.

The Commsision's authorizations of Alabama-Tennessee's expansion were explicitly conditioned upon Alabama-Tennessee's service of Corinth's requirements (e.g., 12 FPC 1449, 1451; 33 FPC 1, 3), which grew from 1,550 Mcf per day in 1953 to 4,500 Mcf per day in 1965, and upon TGP's providing the necessary gas supply through the pipelines of Alabama-Tennessee rather than directly. It is not disputed that Alabama-Tennessee has been diligent in satisfying the increasing demands of Corinth and that service to Corinth has been approved repeatedly by the Commission over a period of years up to and including the Commission's authorization in 1965 (33 FPC 1).

II. The Administrative Proceedings Below.

The proceedings below were initiated on April 25, 1966 by Alabama-Tennessee's application designated Docket No. CP66-336 for a certificate of public convenience and necessity authorizing it to construct and operate 2½ miles of 3½ inch lateral pipeline to parallel its existing lateral to Corinth. This new lateral, estimated to cost $42,900 was required in order to provide Alabama-Tennessee with the capacity to satisfy Corinth's increased requirements for natural gas. These requirements, based upon Corinth's estimates, were expected to reach 6,850 Mcf per day by 1972 (J.A. 76).

Since it executed the 1956 service agreement for a maximum daily quantity of 3,850 Mcf, Corinth has refused to execute new service agreements for the daily

quantities in excess of 3,850 Mcf which it has actually taken from Alabama-Tennessee, since the winter of 1959-1960 (J.A. 6, 10). During the 1965-1966 heating season, Corinth took as much as 5,242 Mcf on a single day (J.A. 21).

To remedy this situation, Alabama-Tennessee requested in the administrative proceeding below that the certificate to be issued be conditioned to require Corinth to enter into a service agreement, in the form contained in Alabama-Tennessee's FPC Gas Tariff on file with the Commission, providing for Corinth's present contract requirement of 3,850 Mcf per day for the period ending February 1, 1970, and for its additional requirements for the period ending November 1, 1985. This type of arrangement had been entered into with other resale customers with the approval of the Commission.

Five months after the filing of Alabama-Tennessee's certificate application, Corinth filed its application under Section 7(a) of the Act (FPC Docket No. CP67-62). Therein, Corinth requested the Commission to enter an order directing TGP to provide its requirements in excess of 3,850 Mcf per day until February 1, 1970, the expiration date of its existing service agreement with Alabama-Tennessee. Thereafter, it proposed to discontinue all of its purchases from Alabama-Tennessee and asked that TGP be directed to deliver to it all of its natural gas requirements. In order to take deliveries directly from TGP, Corinth proposed to construct 3 miles of 8-inch pipeline to a point on TGP's Kinder-Portland line at an estimated cost of $100,000. This would also require TGP to build a metering and regulating station at a cost of $26,275.

The applications of Alabama-Tennessee and Corinth were consolidated by notice of the Commission's Secretary dated October 26, 1966 and the dockets were jointly heard. The Presiding Examiner issued an initial decision on April 28, 1967 (J.A. 77-102) and, after the filing of briefs on exceptions and briefs opposing exceptions, the Commission on November 30, 1967, issued its Opinion No. 534 (J.A. 103-131).

Opinion No. 534 summarily denied the certificate requested by Alabama-Tennessee in Docket No. CP66-336, thereby preventing Alabama-Tennessee from meeting the requirements of Corinth in excess of its existing delivery capacity. It directed TGP to establish a connection with the facilities to be constructed by Corinth and to deliver into such facilities for the account of Alabama-Tennessee until February 1, 1970, Corinth's natural gas requirements in excess of 5,300 Mcf per day, which the Commission found to be the capacity of Alabama-Tennessee's existing lateral line.

But Opinion No. 534 did much more than require TGP to provide supplementary service to Corinth. It provided that on and after February 1, 1970, TGP should sell and deliver to Corinth *its entire requirements* pursuant to TGP's G-1 rate schedule. By this action, it revoked its earlier authorizations for Alabama-Tennessee to serve Corinth and denied Alabama-Tennessee the use of the facilities already built for such service in accordance with the certificates previously granted by the Commission.

The rationale given for the Commission's action was twofold. First, the Commission concluded that Corinth would ultimately effect savings by purchasing from Alabama-Tennessee's supplier rather than from Ala-

bama-Tennessee. Second, it concluded that the losses accruing to Alabama-Tennessee and its resale customers from the revocation of its certificate authority to serve Corinth would be insubstantial.

Alabama-Tennessee filed an application for rehearing and stay and a request to reopen the proceedings to consider more desirable alternatives, such as rate differentials which would provide Corinth with rate reductions approximating the savings which Corinth would obtain by direct service from TGP. By its order issued January 29, 1968, the Commission denied Alabama-Tennessee's application for rehearing as well as an application for rehearing filed by TGP (J.A. 132-36).

III. The Decision of the Court of Appeals.

Alabama-Tennessee on March 6, 1968, petitioned the Court of Appeals for the Fifth Circuit for review of Opinion No. 534. Following briefing, and oral argument on November 7, 1968, the court on August 4, 1969 issued its opinion and judgment affirming the Commission in its entirety.

The court below held that the Commission had the power to direct the commencement of new service by TGP in substitution for Alabama-Tennessee's previously certificated service without regard to Alabama-Tennessee's investment in facilities. In so doing, the court held that the expiration of the service agreement between Alabama-Tennessee and Corinth was controlling and that the Commission's action neither revoked nor modified the certificates of public convenience and necessity previously granted to Alabama-Tennessee authorizing service to Corinth (*Infra,* p. 4a). The court thereby evaded Alabama-Tennessee's principal

contention that under the *Seatrain* doctrine, *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), the Commission is powerless to abrogate certificates authorizing service, when that service is being rendered in strict conformance with the representations made by the pipeline and relied upon by the Commission in issuing such certificates.

To support its conclusion, the court observed that the Commission would have lacked power to require continued service from Alabama-Tennessee if Corinth had sought to substitute service from a non-jurisdictional source at the expiration of its contract. Nevertheless, the court recognized that this is not the situation here since the Commission in this case has ordered and directed substitute service by TGP, an interstate pipeline company over which it has jurisdiction (*Infra*, pp. 4a-5a).[1]

In further support of its conclusion that the Commission had not modified or revoked Alabama-Tennessee's certificates, the court below held that the Commission's action was consistent with Section 7(g) of the Act which provides that the Commission may authorize a new pipeline supplier to serve an area already served by another (natural) gas pipeline company (*Infra*, pp. 4a-5a). This holding failed to recognize that TGP is not a new pipeline supplier but has always been Alabama-Tennessee's sole supplier of natural gas.

The court below also rejected Alabama-Tennessee's contention that the Commission should have evaluated

[1] The Court erroneously refers to the Commission as granting a certificate to TGP authorizing the substitute service. The Commission did not certificate service by TGP, but over TGP's objection ordered and directed TGP to install facilities to enable it to serve Corinth.

Corinth's proposal pursuant to Section 7(b) of the Act since Alabama-Tennessee was being forced to abandon service to Corinth to the detriment of Alabama-Tennessee's other customers in other states. As to this issue, the court adopted the Commission's view that the only purpose of Section 7(b) is to protect those to whom service is being terminated. In so holding, the court specifically rejected Alabama-Tennessee's reliance upon *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83 (1966) and *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) *cert. den.*, 364 U.S. 913.

In addition the court below held that the Commission could direct TGP to serve Corinth pursuant to Section 7(a) of the Act. This holding was in response to Alabama-Tennessee's contention that Section 7(a) was not intended to empower the Commission to require the construction of duplicate facilities to provide a substitute for admittedly satisfactory service.

Otherwise, the Fifth Circuit held that the Commission had not erred by abrogating, in effect, the contract it had previously approved between Alabama-Tennessee and TGP, which contract provided for deliveries by TGP in amounts that contemplated resale to Corinth for a substantial period of time beyond 1970. Finally, the court ruled that the Commission had not erred by reason of (1) the absence of a rational basis for its action, (2) the absence of substantial evidence, and (3) its summary rejection of alternatives submitted by Alabama-Tennessee providing that gas should be sold to Corinth by TGP or that Alabama-Tennessee should institute a zone rate affording Corinth a lesser charge because of its proximity to TGP, Alabama-Tennessee's sole source of supply.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Is in Conflict With Decisions of the United States Supreme Court Which Delineate the Limits of the Commission's Power To Modify and Revoke Certificates of Public Convenience and Necessity.

Significantly the Fifth Circuit's Decision at no point mentions the holdings of this Court which establish that a regulatory agency cannot revoke or modify a previously granted certificate or license, except to correct inadvertent ministerial error, unless such agency possesses explicit statutory authority to do so.[2] Even when such statutory authority exists, this Court has held that the agency must provide statutory notice and hearing on the question of revocation.[3] The absence of any discussion of these cases is particularly noteworthy because they were briefed and argued extensively before the court below.

The statement of the court below that the Commission's action did not pertain to certificates already granted Alabama-Tennessee (*Infra,* p. 4a) is an evasion of the main issue. It elevates form over substance. The Commission *directed* TGP to serve the entire requirements of Corinth including the portion of the service presently being rendered by Alabama-Tennessee. While the Commission did not state specifically that it was revoking Alabama-Tennessee's outstanding certificates authorizing service to Corinth, by its action, it made of them an empty shell.

---

[2] *United States* v. *Seatrain Lines, Inc.,* 329 U.S. 424 (1947); *American Trucking Associations, Inc.* v. *Frisco Transportation Company,* 358 U.S. 133, 146 (1958).

[3] *Civil Aeronautics Board* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961).

The reliance of the Commission and the Fifth Circuit upon the expiration of the contract term and the unwillingness of the purchaser to continue the arrangement is also contrary to the holdings of this Court. In *Sun Oil Company* v. *Federal Power Commission,* 364 U.S. 170 (1960), this Court held that a certificate granted by the Commission is not limited to the term of the underlying contract unless the Commission so provides by an express condition in the certificate order itself. The Commission did not so limit any of the numerous certificates issued Alabama-Tennessee authorizing service to Corinth. Also, it is evident from *United Gas Pipe Line Co.* v. *Federal Power Commission,* 385 U.S. 83 (1966) that the unwillingness of the purchaser to continue under a contractual arrangement does not preclude Commission review of the public convenience and necessity involved.

II. The Decision of the Court Below Is in Conflict With the Holding of Another Circuit and This Court With Respect to the Applicability of Section 7(b) of the Act.

The court below, contrary to holdings of this Court and the District of Columbia Circuit, erroneously views the abandonment section of the Act, Section 7(b), as being limited to the protection of the consumers' right to a continuing source of supply. Accordingly, it held that in an abandonment the Commission's concern is only with the impact on the ultimate consumers abandoned "—to wit the Corinth citizenry."[4]

[4] With regard to the benefits inuring to the "Corinth citizenry," whose interests are placed by the Commission above those of the other communities in Tennessee, Mississippi and Alabama served by Alabama-Tennessee, it is significant to note that not a penny of the hundreds of thousands of dollars of rate reductions and refunds provided by Alabama-Tennessee to Corinth since 1962 has reached the pockets of the "Corinth citizenry."

In *United Gas Pipe Line Co.* v. *Federal Power Commission, supra,* this Court held that the termination of service through existing facilities requires evaluation pursuant to Section 7(b), even if the facilities involved are those of the purchaser, the abandonment is at the purchaser's instigation, and the contract permits termination of purchases. In the instant case, it is service through the seller's facilities which is being terminated, but otherwise the conditions are analogous.

The District of Columbia Circuit, in *Michigan Consolidated Gas Company* v. *Federal Power Commission,* 283 F.2d 204 (D.C. Cir., 1960), *cert. den.,* 364 U.S. 913, rejected the notion that the effect on the customer to which service is being abandoned is the sole consideration in an abandonment case.[5] In *City of Pittsburgh* v. *Federal Power Commission,* 237 F.2d 741, 750-753 (D.C. Cir., 1956), the District of Columbia Circuit held that the Commission must consider the effect on a pipeline's rates of constructing new facilities needed to replace those facilities being abandoned. Moreover, *Pittsburgh* stands for the proposition that the failure to give such consideration is error even though the pipeline company has no immediate plans for constructing replacement facilities and no rate increase is proposed if and when such replacement facilities are built.

---

[5] The Commission had authorized the abandonment on the basis that other customers of the seller, Panhandle Eastern Pipe Line Co., would be benefited, and the abandonment of service to Michigan Consolidated Gas Company would have no effect on the latter company because its loss of the Panhandle gas would be compensated by increased volumes from its other supplier. The court held, however, that the Commission erred by failing to consider the needs of gas consumers that would be served by the other supplier, absent the abandonment (283 F.2d at 217).

In the instant case, Alabama-Tennessee contends that due consideration has not been given to the economic effect of the abandonment upon Alabama-Tennessee and its other customers. Also, the Commission failed to give adequate consideration to Alabama-Tennessee's proposals of reasonable alternatives to the abandonment, as required by both *Michigan Consolidated,* 283 F.2d at 224 and *City of Pittsburgh,* 237 F.2d at 751.[6]

III. There Are Important Statutory Issues Involved.

In addition to the above-discussed direct conflict of the Fifth Circuit's determination with the holdings of this Court and other Courts of Appeals, certiorari should be granted because important interpretations of the Natural Gas Act are involved. The question of the Commission's power under Sections 7(c) and (e) to modify and revoke certificates of public convenience and necessity and the requirement of hearing and notice in connection therewith has already been discussed with regard to the conflict with *Seatrain* and other cases.

There is also presented the important question of whether there is a limitation upon the Commission's power under Section 7(a) of the Act to direct a pipeline company to serve a distributor in replacement of adequate service being rendered by another pipeline company pursuant to certificate authorization, thus permitting facilities of the replaced pipeline to fall into disuse at the expense, and to the detriment, of the other customers. The Court of Appeals' holding that the Commission's order directing new service under

---

[6] See also *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2nd Cir., 1965), *cert. den.,* 384 U.S. 941.

Section 7(a) does no more than could be done pursuant to a certificate application under Sections 7(c) and (e), misses the point. Alabama-Tennessee submits that even upon TGP's application the Commission could not issue a certificate authorizing the new service supplanting the previously certificated service by TGP's customer Alabama-Tennessee. Nevertheless, Alabama-Tennessee further submits that the lack of volition on the part of TGP imposes upon the Commission an additional duty to assure that its action is necessary or desirable in the public interest.

Combined with the above issues is the question of the meaning of Section 7(g) of the Act. This section provides that nothing in Section 7 of the Act shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company. Alabama-Tennessee submits that this section should be read in the light of this Court's holding that the benefits of competition in the natural gas industry are achieved by competing applications for new increments of supply, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964). This is wholly contrary to the view of Section 7(g) espoused by the Commission and the Fifth Circuit that the section supports the complete replacement of a long-term certificated supplier by its own supplier.

The issues posed above are vital to Alabama-Tennessee and its customers. Alabama-Tennessee was originally certificated, and has grown under numerous subsequent certificate orders of the Commission, as a small regional pipeline. The size, location and economic feasibility of its system have been determined by the

Commission in the light of the needs of its customers, who, in this respect are mutually interdependent. Alabama-Tennessee, on the other hand, has been solely dependent upon TGP for its gas supply throughout its existence. Now, in the interests of a single customer and without regard for the importance of its regional services it finds itself characterized as an unnecessary middleman.

In addition, the issues posed are of major concern to the natural gas pipeline industry and are extremely important in prescribing the correct manner in which the Commission must administer the Act. Pipelines which initially occupied fairly well defined corridors from the supply fields to major markets have now expanded into areas adjacent to markets served by other pipelines. Furthermore, long-term contracts originally executed when service commenced a number of years ago are in various instances approaching expiration. As a result, there is an increasing likelihood of competition among pipelines. The fundamental questions that Alabama-Tennessee seeks to have reviewed would aid the Commission and the industry in ascertaining if future competitive applications should be limited to incremental requirements or whether they may also propose to displace in their entirety existing services of certificated suppliers. Moreover, if a certificated supplier of long standing may be displaced, what consideration must be given to its past satisfactory service and the economic effect of such displacement upon supplier's other customers.

The above questions have not previously been determined by this Court or the Courts of Appeal in the factual content presented by this case. Several Federal appellate cases have been directed toward service

of incremental requirements,[7] and while there are cases pertaining to replacement of a supplier, these cases did not involve the total revocation of a certificate for a service specifically authorized by the Commission.[8] In no event was it argued in any of those cases that the authorization of a substitute service constituted the revocation of a prior certificate and a violation of the holding of this Court in *Seatrain* and similar cases.

CONCLUSION

For these reasons, it is urged that this petition for certiorari be granted.

Respectfully submitted,

STANLEY M. MORLEY
FRANCIS H. CASKIN
LOUIS FLAX
Attorneys for Alabama-Tennessee Natural Gas Company

SHANNON AND MORLEY
1700 K Street, N.W.
Washington, D. C.

December 22, 1969

---

[7] *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 169 F. 2d 881 (D.C. Cir. 1948) *cert. den.*, 335 U.S. 854; *Home Gas Company* v. *Federal Power Commission*, 231 F. 2d 253 (D.C. Cir. 1956) *cert. den.*, 352 U.S. 831; *Atlantic Seaboard Corporation* v. *Federal Power Commission*, 397 F. 2d 753 (4th Cir. 1968).

[8] *Kentucky Natural Gas Corp.* v. *F.P.C.*, 159 F. 2d 215 (6th Cir. 1947). (Replacement of service existing prior to the Act and granted "grandfather" authorization.) *Cincinnati Gas & Electric Company* v. *Federal Power Commission*, 389 F. 2d 272 (6th Cir. 1968) *cert. den.*, 393 U.S. 826. (Replacement of uncertificated service by an intrastate distributor.) *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 397 F. 2d 753 (4th Cir. 1968). (Continued service and use of facilities under existing certificate authorization, but with possibly reduced levels of off-peak deliveries.)

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

(August 4, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

TAYLOR, District Judge: This is a proceeding to review Orders of the Federal Power Commission (Commission) issued November 30, 1967 and January 29, 1968. The November 30, 1967 Order directed Tennessee Gas Pipeline Company (TGP), an interstate natural gas pipeline company, to interconnect its facilities with the facilities of City of Corinth, Mississippi, (Corinth), and beginning February 1, 1970 sell natural gas to Corinth for distribution to its customers. The November 30 Order also denied the application of Alabama-Tennessee Natural Gas Company (A-T or Petitioner), an interstate natural gas pipeline company, and Corinth's present supplier of natural gas, for authority to construct additional lateral line capacity to sell increased volumes of gas to Corinth. The Order issued January 29, 1968 denied Petitioner's application for rehearing and stay. Petitioner asserts that the Commission exceeded its statutory powers by:

a. modifying and revoking past certificate authorizations to A-T;

b. failing to test its action according to Section 7(b) of the Natural Gas Act governing abandonment of certificated facilities and service;

c. misapplying Section 7(a) of the Act by ordering the construction of duplicate facilities to serve a market already adequately served; and

d. abrogating a contract which it had previously approved.

It is further urged by Petitioner that the Commission's exercise of power was not rationally based. Disagreeing with these contentions and being of the opinion that the Commission acted in the public interest, we affirm the Opinion and Orders of the Commission.

Petitioner is an interstate natural gas pipeline company which has Corinth among its purchasers for resale. The service contract between the two runs until February 1, 1970. Petitioner purchases its entire natural gas supply from TGP. It now receives the gas a short distance from Corinth, carries it three miles through its system and makes delivery to Corinth through a 3.5 inch diameter lateral pipeline 2.5 miles in length, which is no longer adequate to meet the growing needs of the city. For a number of years Petitioner has been supplying Corinth with gas in excess of the maximum daily quantity of 3,850 Mcf specified in the contract and has been paid therefor in accordance with agreed demand and commodity charges. Corinth, having become disenchanted with Petitioner, whether rightly or wrongly, refused to execute a new service agreement providing for a greater maximum daily quantity and extending the contract beyond its 1970 expiration date. The present proceedings commenced when Alabama-Tennessee filed an application with the Commission for a certificate of public convenience and necessity authorizing construction of a 2.5 mile, 3.5 inch diameter pipeline, paralleling the one already in existence between Alabama-Tennessee and the city, upon

condition that Corinth be required to enter into a new contract for increased maximum daily quantities and for an extended period. This proposed facility was estimated to cost something in excess of $42,000.00.

Corinth intervened in opposition to the application and thereafter filed an application, under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), for an order directing Tennessee Gas to connect its facilities to those of Corinth and to sell Corinth the gas needed in excess of the 3,850 Mcf per day specified in its contract with Alabama-Tennessee until February 1, 1970, and 6,550 Mcf per day (the city's estimated total requirements) thereafter. The cost to the city of the physical connection was estimated to be about $100,000 and the resultant saving in gas costs would be, it was claimed, $100,000 annually when Tennessee Gas would be supplying Corinth's full requirements.

On motion of Petitioner, the two applications were consolidated. After hearings and briefing, the examiner, save in respects not here at issue, denied Petitioner's application and granted Corinth's on April 28, 1967. The Commission, with some modifications, concurred. The Commission found that the substitution of Tennessee Gas as its supplier would result in a 20-year saving to Corinth of about $2,000,000.00. It was also found that the loss of sales to Corinth would be more than compensated for by normal growth in Alabama-Tennessee's sales to others and that the detriment to Alabama-Tennessee would not be serious. Thus, in 1964, Alabama-Tennessee's peak-day load was 67,841 Mcf and its annual sales were 11,261,946 Mcf. The estimate for 1966 was a peak of 89,710 Mcf and an annual volume of 12,914,200 Mcf. Both these sets of figures include sales to Corinth. Even without sales to Corinth, it was estimated that Alabama-Tennessee's 1970 peak would be 96,340 Mcf and its volume 16,195,400 Mcf, a substantial increase over the actual and estimated past. The Commission further found that the unamortized cost of the

existing Corinth lateral pipeline and metering facilities would be approximately $40,000 by February 1, 1970, the contract termination date. Of this amount 60% would be the cost of meter stations which would have some salvage value. The balance, the Commission held, could be written off over a period of years so that the adverse effect on Alabama-Tennessee would be negligible.

Alabama-Tennessee's primary contention is that the Commission's approval of Tennessee Gas as the supplier for Corinth, with the resultant termination of sales by Alabama-Tennessee to Corinth, constitutes an invalid revocation of its certificate of public convenience and necessity authorizing sales by it to Corinth. The certificates upon which Alabama-Tennessee relies do authorize it to sell gas to the city of Corinth which distributes gas locally, but this authorization in no way assures Alabama-Tennessee that Corinth would purchase the gas for the Commission has no authority to require a local distributor to contract for purchase, or accept delivery of natural gas. Michigan-Wisconsin Pipe Line Company, 6 FPC 1, 34 (1947), affirmed *sub nom. Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 169 F.2d 881 (CADC), certiorari denied, 335 U.S. 854 (1948). Such assurance lay only in Corinth's willingness to purchase gas under a long term contract or otherwise. Under these circumstances pipeline companies have generally attempted to obtain long term contracts with distribution companies, and it is noted that if gas could be obtained from a local intrastate source the Commission has no power at all to prevent the separation of the purchaser. What the Commission did in this case was to grant a certificate to TGP and denied an application for a certificate for expanded service to A-T. The proceedings in no way pertained to certificates already granted to A-T. The power to grant additional certificates for an area already serviced is clearly granted by 7(g), which provides in part that:

> "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity

for service of an area already being served by another natural gas company."

The Commission could at the termination of a long term contract require the distributor to continue dealing with the original supplier by refusing to certificate a substitute supplier if the only alternative gas supply is from another interstate pipeline. This possibility, however, could in no way convert a certificate authorizing sales to a willing customer into a vested right under the Natural Gas Act to continue serving a particular customer indefinitely. A certificate of public convenience and necessity is not a grant of a monopolistic position in a particular area. The courts have on occasion recognized that the above quoted language of Section 7(g) makes clear that competition from markets is contemplated under the Act. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, supra at 884; *Home Gas Company* v. *F.P.C.*, 231 F.2d 253, 257 (CADC), certiorari denied, 352 U.S. 831 (1956); *Cincinnati Gas & Electric Co.* v. *F.P.C.*, 389 F.2d 272 (CA 6, 1968), petition for certiorari pending, S.Ct. No. 99, O.T. 1968. The Fourth Circuit has recently said that the "Natural Gas Act does not expressly limit a second supplier to incremental sales, and neither the commission nor the courts have imposed such a rigid exclusion. The Act's primary criterion for certification is the public interest." *Atlantic Seaboard Corp.* v. *F.P.C.*, 397 F.2d 753, (CA 4, 1968). A-T's contention in this regard is without merit.

As to the assertion that the Commission should have tested its action according to the standards of Section 7(b) the Commission said:

> "A-T contends that the issue of the loss of Corinth as a customer should be governed by the abandonment principles of Section 7(b) which requires a hearing and finding that 'public convenience or necessity permit such abandonment.' This position that a customer seeking a new source of supply is analogous to an

abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the customer to any given source of supply.

"A-T's reliance on *Michigan Consolidated Gas Co.* v. *F.P.C.*, 382 F.2d 204 (CADC 1960), *cert. den.* 364 U.S. 913, in support of its thesis that this must be considered an abandonment is not well taken. The consideration and emphasis in an abandonment case, as the court there indicated, is the impact *on the party being abandoned.* In the instant case the party being abandoned—more correctly, separated; albeit at its own request—is Corinth, not the other customers of A-T. The other customers will continue to be served. Hence, even if the Commission were to consider that Corinth's application is, as A-T contends, subject to Section 7(b), it would be constrained to determine the impact upon the ultimate consumers abandoned by (or separated from) A-T—to wit, the Corinth citizenry. When viewed in such light, the public convenience and necessity loom largely in favor of allowing the consumers access to lower priced gas."

We agree with the Commission's construction of Section 7(b).

Any reliance which A-T places on *United Gas Pipe Line Co.* v. *F.P.C.*, 385 U.S. 83 (1966), is ill-founded. In that case, United was certified to construct a pipeline to a producing field whose operators contracted to sell to United. United did construct the pipeline and then abandoned it. Thus the *United* case, unlike this case, concerned an abandonment by the unilateral decision of a pipeline company over which the Commission had jurisdiction, rather than a new connection to a local distributor as in this case. The Supreme Court said, in part, "We hold only that United has abandoned facilities and service without the consent

of the Commission and that it must reactivate those facilities and restore the service until and unless the statutory consent is obtained." As the Commission observed, Section 7(b) is "designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the consumer to any given source of supply." The fact remains that if Corinth chose to utilize another form of energy it could have terminated A-T's service without the Commission's consent.

A-T's contention that Section 7(a) was never intended to enable a distributor of natural gas to displace a certificated supplier which has fully and adequately performed its authorized function is likewise without merit.[1] A-T's certificate of authority to serve Corinth was not revoked Section 7(g) makes clear the Commission's power to grant more than one certificate of public convenience and necessity for one service area.

Section 7(e) directs the Commission to grant such certificates to any qualified applicant. Also, the Commission has the power to direct extension of services by a certificated company under 7(a). With these factors in mind, the Commission was well within its power to grant a certificate of public convenience and necessity to TGP to serve Corinth or to direct TGP to make connection with Corinth's pipeline. As was said in *Home Gas Co.* v. *F.P.C.*, 231 F.2d 253 (DCCA 1955):

". . . Petitioners contend that, assuming the Commission has power under the Act, 15 U.S.C.A. § 717(a),

---

[1] Section 717(a). "Whenever the Commission . . . finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public . . . if the Commission finds that no undue burden will be placed upon natural-gas company thereby . . . ."

(e) and (g), to grant a certificate of public convenience and necessity to a second supplier for service to an area already being served, the Commission has no power to require such service by order pursuant to § 717f(a) ....

"To uphold petitioner's contentions would in effect force us to consider the above noted sections as being mutually exclusive. This we cannot do. Indeed, we find them complementary. No basis exists in the legislative history of the Act, and certainly none in the plain language of the text, for the creation of a third limitation on § 717f(a), as petitioners urge, namely, where the area involved is already being served by a natural gas company." pp. 257-258.

Petitioner A-T also asserts that the Commission had no power to abrogate the contract between A-T and TGP which it had previously approved. This contract became effective on May 10, 1966 for a term expiring November 1, 1986 and was approved by the Commission with knowledge that 4700 Mcf per day was included for Corinth. What has been heretofore said must indicate our holding with reference to this contention of A-T. A contract between A-T and TGP, even though approved by the Commission, could not have the effect of creating a monopoly for A-T or giving a vested right to A-T to perpetually serve Corinth. And certainly the contract could not have the effect of abrogating the Natural Gas Act and the power of the Commission to serve the public interest. As the examiner pointed out, when A-T made the contract with TGP it knew "that the sales contract with Corinth expired in 1970" and A-T "cannot impose additional obligations on a customer simply by obligating itself to a supplier."

Petitioner's remaining points actually go to the question as to whether or not the Commission's exercise of power was (a) rationally based, and (b) supported by substantial evidence. The facts are not disputed. The substitution of TGP for A-T will substantially reduce Corinth's cost;

A-T's resultant loss of volume will be more than offset by normal growth; and the undepreciated cost of its facilities that will be rendered useless by the substitution will not only be minuscule but amortizable over a period of years as well. Both the examiner and the Commission found that the adverse effect on Alabama-Tennessee and its remaining customers would be negligible. A-T, without disputing the basic facts, criticizes the Commission's alleged failure to fully evaluate the detriment the loss of Corinth would cause petitioner. It contends that a proper consideration of loss of profits must take into account the cost of new facilities needed to serve the growth that will offset the lost volumes. Petitioner, however, has supplied no specific information as to such costs nor as to how such costs, if any, would compare with the cost of the facilities for which A-T sought and was denied a certificate. Without this information resultant detriment may not be assumed. *Lynchburg Gas Company* v. *F.P.C.*, 336 F.2d 942, 947-948 (CADC, 1964). See also *Atlantic Seaboard Corporation* v. *F.P.C.*, supra; *Cincinnati Gas & Electric Co.* v. *F.P.C.*, supra. A-T is really arguing the undesirable fact that it and perhaps its other customers would be better off with Corinth as a customer than without it, but as pointed out in the Lynchburg and Atlantic Seaboard cases, supra, this is not the decisive test but merely a factor. As noted by the Commission, to permit this consideration to be controlling "would inevitably bind a customer to its existing supplier, thus effectively preclude the realization of the fruits of competition".

A-T also complains that the Commission rejected out of hand the alternative of a "transportation" or "delivery for the account of" arrangement under which A-T would make delivery of the gas for the account of Tennessee Gas and charge a transportation fee therefor. In this connection the Commission correctly held:

> "* * * Were A-T [Alabama-Tennessee] to transport the gas, the charges would either have to be allocated

directly to Corinth, in which event they would exceed the costs of transportation via a Corinth built lateral, or they would have to be rolled into A-T's cost for the entire system. This latter alternative would in effect not only require other A-T customers to bear the burden of some share of the transportation charges, but would result in Corinth's share exceeding its cost of transport via a Corinth owned lateral. Accordingly, considered on its own merits or comparatively with these alternatives, the proposal which we are certificating results in substantial savings to Corinth and is in the public interest."

A-T also faults the Commission for dismissing its rate zone alternative which would result in a reduction in Corinth's rates and an increase in the rates of customers which are more remote from the source of supply. It appears from the record that this proposal came on the last day of the hearing and no evidence was introduced or sought to be introduced in this regard. The Commission correctly pointed out that a change in the rate structure could not be made without a full-blown rate case with notice and opportunity to intervene to all customers and interested parties not represented in this case. This would result in extensive delay which might cause Corinth to suffer from an insufficient gas supply for the coming season.

From what has heretofore been said it is apparent that the Commission's orders are supported by substantial evidence and had a plainly rational basis. Its decision as to where the public interest lay was an exercise of regulatory authority entrusted by Congress to its informed judgment. *Permain Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Atlantic Seaboard Corp.* v. *F.P.C.*, supra.

Accordingly, the opinion and orders of the Commission are

AFFIRMED.

Date: .....

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

Judgment

This cause came to be heard on the petition of Alabama-Tennessee Natural Gas Company, for review of Orders of the Federal Power Commission issued on January 29, 1968, in Docket Nos. CP66-336 and CP67-62, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in this cause, be, and the same are hereby affirmed.

August 4, 1969

Issued as Mandate: Oct. 6, 1969

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

On Petition for Rehearing and Petition for Rehearing En Banc

(September 24, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

Excerpts From the Natural Gas Act (15 U.S.C. § 717 et seq)

SEC. 4. (a) * * *

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [52 Stat. 822 (1938); 15 U.S.C. § 717c (b)]

* * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the

hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

* * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. § 717f (g)]